The state of Ohio vs. Forbes and Armitage

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THE STATE OF OHIO vs FORBES AND ARMITAGE, Arrested upon the Requisition of the Government of Ohio, on charge of KIDNAPPING JERRY PHINNEY, AND TRIED BEFORE THE FRANKLIN CIRCUIT COURT OF KENTUCKY, April 10, 1846.

PREFACE.

The leading motive for publishing this report, is to inform those who feel an interest in the matter, what was really done, both by the authorities of Ohio and Kentucky. By this it will be seen that the Governor of Ohio did not neglect to make the proper requisition, at the hands of the Governor of Kentucky, for the fugitive Kidnappers; and that, however derogatory the statute of Kentucky of 1820, may be to the Constitution of the United States; and however erroneous the decision of the court may have been, the authorities of Kentucky treated beth the Executive of Ohio and his agent with the utmost respect and courtesy. Of this I have spoken in, what I conceived to be proper terms in my official report to the Governor of Ohio, as well as in my argument at bar in Kentucky.

I went to Frankfort a total stranger, with letters of introduction from two or three gentlemen of Cincinnati, which I did not at first present, prefering first of all, to present the official documents to the Chief Executive, that I might be respected, if at all, because I was the representative of Ohio, rather than on my own account or that of my friends. Governor Owsley received me with great kindness and cordiality, and immediately issued his warrant for the arrest of the fugitives, and on the day following the Sheriff reported them in custody. Judge Brown, who was charged with the hearing of the cause called on me army lodgings to inform me that he would postpone all other business, and set the cause for hearing on any day or days which I might designate, and that he had instructed his

Clerk to issue Subpoenas for any witnesses I might require, and requested Mr. Craig in whose custody Finney was, to allow me free access to him at all times for the purpose of prelim inary consultation, suggesting, at the same time, his desire to hear all the questions involved fully discussed.

The Clerk, the Sheriff, and other officers performed their duty with equal alacrity, and promptness, and I had every facility for a full, fair and impartial investigation afforded me, not merely by the officers, but by the members of the bar and other private citizens, of character and influence.

In the progress of the case, it will be seen that not only Phinney's case, but incidentally, the subject of slavery itself, was discussed with plainness, at least, in the midst of a very large assembly of spectators, all of whom listened with profound attention, and none of whom manifested the least sign of disrespect or hostility.

I have thought proper to say thus much from a sense of justice to Kentucky, as well as for the purpose of explaining those parts of the argument which might otherwise be construed into flattery.

WILLIAM JOHNSTON

***Franklin Circuit Court, Kentucky, April* 10 *th,* 1846, *before the* Hon. Mason Brown, *Circuit Judge.* The State of Ohio *v.* Forbes & Armitage. SLAVERY—KIDNAPPING—FUGITIVES FROM JUSTICE**

Link to Annals.

A writ was produced in open Court, issued by William Owsley, Governor of Kentucky, setting forth that Mordecai Bartley, Governor of Ohio, had demanded the persons of A. C. Forbes and Jacob Armitage, fugitives from justice, charged by affidavit, with having kidnapped Jerry Phinney, a free colored man, resident of Ohio, and that the Governor of Ohio had appointed William Johnston his agent, to receive said Forbes and Armitage,

and bring them back to be tried under the laws of Ohio, upon said charge of kidnapping. The writ of Governor Owsley commanded the sheriff to arrest said Forbes and Armitage, and take them before a Circuit Judge, to be examined and dealt with according to the provisions of an Act, entitled “An Act to amend the Act reducing into one the several acts authorizing the apprehending of fugitives from justice:” Approved Jan. 27, 1820.

The writ bore the sheriff's return, that it had been duly executed on said Forbes and Armitage, who were then present in Court, in custody of the sheriff.

Mr. William Johnston appeared on behalf the State of Ohio, and Mr. Charles S. Morehead on behalf of Forbes and Armitage.

The Court asked the attorney for Ohio, if he desired to produce any testimony, tendering the power of the Court to enforce the appearance of any witnesses required.

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Mr. Morehead read the statute of 1820, and waived all technicality touching the points of indictment, affidavits and identity.

Mr. Johnston would take no technical advantages; but he desired a fair investigation which should in good faith respect the rights and dignity of Ohio and Kentucky, and the result of which, be it what it might, should satisfy the authorities and the people, and allay excitement on both sides of the water.

Mr. Morehead presented the issues, that Jerry was a slave, and that Forbes and Armitage had the approbation of his owners, in taking him in Ohio, and delivering him to them in Kentucky.

After the introduction of the testimony, which is sufficiently stated in the opinion of the Judge,

Mr. Morehead opened the argument, stating his points as foollows:

1. Under the peculiar writ issued by the Governor of Kentucky, and under which Forbes and Armitage were now before the Court, the *only enquiries* which could be made, were, is Jerry a slave? and had Forbes and Armitage the authority of the owner, or her approbation for his recapture?

Mr. Johnston replied, traversing the grounds of Mr. Morehead, and urging the following positions in support of the demand of the Governor of Ohio, for the fugitives, Forbes and Armitage:

1. The Kentucky statute of 1820, is at variance with the constitution of the United States, and the law of Congress of 1793, and void.

2. If the statute of 1820 be void, the Court has jurisdiction only of the question of identity, under the statute of 1815.

If the statute of 1820 be valid, and the Court has jurisdiction, then three questions of fact are involved.

1. Is Jerry a slave, and the property of any one?

2. Who is his owner?

3. Did Forbes and Armitage act as the agents, or with the approbation of the owner?

The second point is conceded, for if Jerry be a slave, Mrs. Long representing in her own right, and as administratrix of 5 her deceased husband, 26–27ths of Jerry, for the purposes of this case, may be considered the owner.

The third point is conceded also, as to Forbes, but insisted on as to Armitage, because there is no proof of the *express* approbation of the owner as to him.

The main question is upon the first point. Was Jerry a slave at the time Forbes and Armitage aided in seizing him at Columbus?

1. Slavery is contrary to the law of nature, contrary to the law of nations, and exists only by force of the municipal law of the land.

2. Slavery is strictly local, and confined within the territorial limits of the State where it is sanctioned, and cannot follow the fugitive beyond those limits, except by positive law, binding on both sides of the line.

3. The only law varying these great principles of natural and international law, is that to be found, 1st in the ordinance of 1787 for the government of the North Western Territory; 2d, in the Constitution of the United States; and 3d, in the Law of Congress of 1793, which latter cannot be so construed as to extinguish the guaranty of liberty, contained in the ordinance of 1787, or to extend the rights guaranteed to the owners of fugitive slaves by the Constitution of the United States.

4. The clauses of the ordinance of 1787, of the Constitution of the United States and the law of Congress of 1793, authorizing fugitives from labor to be pursued into the North Western Territory, being contrary to the law of nature, contrary to the laws of nations, and restrictive of human liberty, must be strictly construed.

5. Strictly construed, these clauses can extend to but one case—that of an *escaping slave.* This implies a voluntary act of the slave contrary to the wilt of the master, and if by any other than by his own will he is carried into the North Western Territory, the relation of Slavery ceases as completely, as if he had been carried into France, or any other foreign State.

6. If the slave becomes free but for a moment, he can never again be reduced to slavery; not even by his own act, because the right of freedom is unalienable.

7. It matters not that the slave was carried beyond the line by a bailee to whom he was hired; if he is carried over in the relation of a slave, even by a person having a temporary dominion over him, be becomes *ipso facto* free, and the owner has his right of action against the bailee for the loss of his services. The law governing chattels does not apply to property in human beings. God gave man dominion over, and property in the beasts of the field, &c., but the property in man he reserved to himself. The property in animals is natural and binding every where; That in man is conventional, municipal, local, and to be kept within the literal meaning of the written law.

In answer to the positions of Mr. Johnston, Mr. Morehead continued:

1. That the question of the constitutionality of the Kentucky act or 1820, could not arise in this proceeding. In ordinary cases, the question is perhaps exclusively an executive one, except as to the single inquiry of identity. In this case the Governor of Kentucky had issued his writ in obedience to the requisition of the Governor of Ohio, in conformity with the act of 1820; and this Court had nothing to do but to make the inquiries directed by the writ. If the act of 1820 be at variance with the Constitution of the United States, and the law of Congress passed in pursuance thereof, the Governor might have disregarded it, and issued his writ as in ordinary cases, and this Court, it may be conceded, would be compelled to obey the Executive mandate upon proof of identity alone.—But there is no Executive mandate to deliver these persons to the agent of the State of Ohio, unless it is ascertained that Jerry is a free man, or that they acted without the authority or approbation of the owner.

The alleged fugitives cannot be delivered up under this writ, without the preliminary inquiries directed by the writ itself. The constitutionality of the act of 1820, cannot therefore arise, and need not be discussed.

2. Is Jerry a slave?

1. Slavery is what the municipal law has made it, the rights growing out of which extra-territorially are guaranteed by the Constitution of the United States. Whether in conformity to 7 natural or to divine law is no question here, and ought not to affect in any degree the fair, liberal and just exposition of the laws securing those rights.

2. The ordinance of 1787 for the government of the northwestern territory, it is true, declares “that there shall be neither slavery nor involuntary servitude in the said territory.” But in the case of *Rankin v. Lydia,* 2 *A. M. Marshall,* 467, decided at the fall term of 1820, of the Court of Appeals, it is said, that “when the ordinance declares that slavery shall not exist there, it evidently means among the inhabitants and settlers, and not among the travellers or *sojourners* there. Their case is not affected by the provisions of the ordinance; against them no provision exists.”

The same principle is recognized and enforced in the case of *Graham v. Strader, &c.,* 5 *B. Monroe,* 153. In that case the question is directly decided, that the owner of a slave, residing in Kentucky, does not forfeit his slave by taking him to Ohio, or permitting another to do so, where the object of the visit is temporary, or in other words, where the party taking him there was a mere sojourner, and not domiciled.

3. The slave Jerry being taken to Ohio by a mere bailee, without the approbation and against the consent of his owner, and that bailee not being domiciled in Ohio, and returning the slave to his owner in Kentucky, the ordinance of 1787 can have no effect on his condition upon the most technical and strict construction of the ordinance.

4. Jerry not being entitled to his freedom, in consequence of being taken to Ohio by a bailee, the manner of his afterwards leaving his owner, made him “ *an escaping slave,*” in the true and proper meaning of the terms.

5. After the return of Jerry by the bailee to his owner in Kentucky, she could have maintained no action against him, on the ground that he had become free, as settled by the before cited case of *Graham v. Strader.*

6. The ownership of the slave being admitted, and the power of attorney to Forbes fully proven, the law will imply that authority was given to him to make use of all necessary means to accomplish the object in view, and consequently that Armitage acted with the approbation of the owner.

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7. The authority of the appellate Court is binding on this Court, and it is useless to discuss the correctness of decisions made elsewhere in conflict therewith.

Opinion of the Court. —Alexander C. Forbes, and Jacob Armitage having been arrested by the Sheriff of Franklin County, under a warrant from the Executive, were brought before me in pursuance of the mandate thereof. The warrant after reciting that they had been demanded by the Governor of Ohio, as persons charged by affidavit before Alexander Patton, a Justice of the Peace, of Franklin County, Ohio, with seizing upon and by violence keeping in restraint, with intent to transport out of the State of Ohio, one Jeremiah Finney, said to be a free man of Ohio, but claimed as a slave of Kentucky, directed the said Sheriff to “apprehend and arrest the said Alexander C. Forbes, and Jacob Armitage, and upon their apprehension, to bring them before some Circuit Judge of this Commonwealth, that the said Circuit Judge may proceed by proper and legal testimony, to inquire into the matter, so far as shall be necessary to ascertain the identity of the said Forbes and Armitage, and their guilt or innocence in the premises, according to the statute of Kentucky, 27th January, A. D. 1820, in relation to fugitives from justice; and if they, the persons mentioned in this my warrant, be identified as offenders against the laws of Ohio, and be found not entitled to the benefit of the provisions of the said act of 1820, that the said Judge may order them to be delivered up to William Johnston, Esq., who has been duly authorized, by the Governor of the State of Ohio, to receive and convey the said

Alexander C. Forbes, and Jacob Armitage, to the State of Ohio, to be dealt with according to law," &c., &c.

The facts proved upon the inquiry, were substantially these:

Jerry Finney was born a slave in the house of Hezekiah Brown, of a colored woman named Rose. This woman and Jerry were held by Brown, not in his own right, but as the property of his wife; Rose having belonged to a former husband by the name of Long, by whom, previous to her marriage with Brown, she had eight or nine children, amongst others, Thomas Long. In the last will and testament of Hezekiah 9 Brown, he loaned to his wife a number of articles of property, real and personal, amongst other things, the boy Jerry, to be held during her natural life, and after her death to go to her heirs. After the death of Brown, his executors, Henry Brown and John D. Richardson, executed a paper relinquishing to Mrs. Brown, who survived her husband, all claim on the part of Brown's estate to the boy Jerry, and declaring that they knew him to be her property, and part of her former husband's estate. Thomas Long, one of Mrs. Brown's sons by her former husband, purchased in his lifetime the interests of all the other heirs except three, and died, leaving Bathsheba Long his widow, who administered upon his estate, and purchased in her own right the remaining interests of the other heirs, except the third of one share, which is outstanding. Mrs. Long has settled up, and made distribution of all her husband's estate except Jerry. One of her children is still a minor.

Sixteen or seventeen years ago, Mrs. Brown, after her hushusband's death, hired the boy Jerry to a gambler by the name of Allgaier, who represented that he was going to work him on a farm in Woodford county, Kentucky—with a stipulation on Allgaier's part, that he should not take him out of the State.

Allgaier took Jerry to the State of Ohio, and kept him in his services there for six months; when learning the fact, Mrs. Long, who held the remainder in Jerry, wrote Allgaier a letter, directed to him at Cincinnati, requiring him to return Jerry immediately, and threatening to

sue him if he did not comply; upon which Allgaier returned him to his mistress, Mrs. Brown, who was still living, now deceased. A few weeks after, Jerry asked permission to return to his last place of residence for his clothes, which his mistress gave him, and he went away and never returned till he came back in custody of Forbes and Armitage. Mrs. Brown advertised him as a runaway slave, and offered a reward for his apprehension; and since then, knowing that he was in the State of Ohio, Mrs. Long has given three different powers of attorney, at different times, to different persons, to bring him back, but always failed. A short time ago, she, Mrs. Long, executed regularly, according 10 to law, a power of Attorney to Forbes, whom she at the time had never seen, to appehend and return Jerry to her, at Frankfort, Kentucky. It is admitted that the prisoner at the bar is the same Forbes, and that the prisoner Armitage acted in the matter of Jerry's seizure, in conjunction with Forbes.

All the questions of law and fact, in any respect bearing upon the foregoing state of the case, have been argued with great zeal and distinguished ability, by the gentleman representing the State of Ohio, and the counsel retained by the prisoners, and I regret that the necessity for an immediate decision, and the other duties of the Court, now in session, prevent me from presenting and noticing in detail the various positions respectively taken, to illustrate and sustain the points so fully and ably debated by them.

It is urged in substance by the counsel for the State of Ohio:

1. That the statute of 1820 of Kentucky, is at variance with the Constitution of the United States, and the law of Congress of 1793, and void.

2. That if the statute of 1820 be void, the Court has jurisdiction only of the question of identity, under the statute of 1815.

3. That if the statute of 1820 be valid, and the Court has jurisdiction, then it is insisted that in view of the facts as proved, Jerry is by the paramount law of the land free, and cannot be regarded as an escaping slave.

4. That if Jerry be a slave, and the power of attorney valid, for the protection of Forbes, still is it not so as to Armitage, as there is no proof of the *express* approbation of the owner as to him.

The converse of these propositions is insisted upon by the counsel for the prisoners. He also insists that the constitutionality of the act of 1820 is not necessarily involved in this inquiry. That the executive is the sole judge of the terms and conditions upon which he will order the surrender of a fugitive, and that he alone is competent to decide whether he will or not be controlled by the act of 1820.

The second section of the fourth article of the constitution of the United States, and the act of Congress of 1793, respecting fugitives from justice, so far as they prescribe the mode for the arrest and delivery of fugitives, are addressed exclusively 11 to the Executive. The Constitution enjoins the duty, and the act of 1793 prescribes the mode and conditions under which that duty shall be performed. It is made strictly, and in terms, an Executive act. The Executive alone is required to order the arrest and direct the delivery. Indeed in the case of the State of South Carolina ex parte Willard and wife, *ads.* the State of New York, it was held that the demanding, apprehending, and conveying away fugitives from justice under the provisions of the Constitution, were ministerial acts, wholly entrusted to the management and discretion of the Executive, and were so exclusively of Executive cognizance, that they were excepted out of the State habeas corpus act of South Carolina, by the operation of the Constitution and laws of the United States. And when certain persons were brought up before a Judge of that State, by habeas corpus, who were under arrest by order of the Executive of South Carolina, for the purpose of being delivered to an agent of the Executive of Now York, who had demanded them as fugitives from justice in that state, their discharge was moved on various grounds; but the Judge decided that he had no power or authority to discharge the prisoners, or in any way whatever to interfere with the mandate of the Executive. *See Sergeant's Constitutional Law, page* 395.

The act of Kentucky, approved 27th January, 1820, in relation to fugitives from justice, imposes restrictions upon the delivery of fugitives by the Executive, which restrictions are not found in the act of Congress of 1793, and it must rest with the Executive to decide whether he will recognize those restrictions as binding on him, or whether, disregarding the said act, he will direct an unconditional delivery of the prisoners.

The Executive has directed the prisoners to be delivered up on condition that they are not within the restriction of the act of 1820. Should I, by my mandate, direct them to be delivered to the agent of Ohio upon any other terms than those prescribed by the Executive, I would not only be exercising Executive power, but would be exercising the same in direct hostility to the will of the Executive.

As ancillary to the action of the Executive, it only remains 12 to inquire whether a state of case exists, under which a delivery is directed.

The act of 1820 contains the following provisions:

Sec. 1. *Be it enacted by the General Assembly of the Commonwealth of Kentucky,* That in all cases where any negro slave or slaves, have, or may hereafter run away from his, her or their owner, or owners, and take protection in any of the United States, and the owner or owners of such slave or slaves, by themselves, their agent or any other person with their approbation, shall have removed, or shall hereafter remove any such slave or slaves from any other State within the United States into this Commonwealth, and he, she, or they have been, or shall hereafter be indicted for the same, in any one of the United States, and the Governor of said State shall demand of the Governor of this State the person or persons so indicted, or who may hereafter be indicted, to be delivered to him agreeably to the Constitution of the United States and this State, it shall be the duty of the Governor of this Commonwealth, upon such requisition being made according to law, to issue his warrant to the Sheriff of the county where such supposed fugitive may reside, if he has a known place of residence, requiring him to take into custody such supposed

fugitive or fugitives from justice, as are named in such warrant and indictment, and bring him, her or them before a Circuit Judge; and if the Circuit Judge shall be of opinion that the person or persons named in such warrant and indictment, are the owner or owners of the slave or slaves named in such indictment, or that he, she or they acted as the agent, or by approbation of the owner or owners of such slave or slaves, it shall be the duty of the Judge to discharge the person or persons, taken by virtue of said warrant, out of custody.

Sec. 2. *Be it further enacted,* That if the Judge shall be of opinion that the person or persons taken into custody by virtue of the Governor's warrant, is not the owner or owners of the slave or slaves in the indictment found against him, her or them, in any one of the United States, for stealing and conveying a slave or slaves which are not their own property; or that he, she or they did not act as the agent, or by the approbation of the owner or owners of such slave or slaves, 13 then it shall be the duty of the Judge to remand such person or persons into custody again, to be dealt with according to the laws now in force on that subject.

Three questions are embraced in the inquiry under the act:

1. The identity of the prisoners.

2. Was Jerry an escaping slave?

3. If Jerry was an escaping slave, did the prisoners remove him from Ohio, as the authorized agents, or by the approbation of his owner?

The identity of the prisoners, as the persons demanded, is admitted. The proof is satisfactory, that Forbes acted under a regular and duly authenticated power of attorney from Mrs. Long, and that Armitage acted with him and at his instance; and a just construction of the act must regard Armitage, when thus acting, as acting under and by virtue of the power of attorney, and with the approbation of Mrs. Long.

It remains to inquire, whether Jerry, at the time of his removal from Ohio, was a fugitive slave.

It is true this question must be tested by the paramount law of the land, and did the evidence exhibit the case of first impression, every aid should be derived from, and respect shown to the adjudications of our sister States, in ascertaining what the law is upon the case as stated. But when the question has been fully adjudicated by the Supreme Court of our own state, such decision must be taken as conclusive evidence of what the law is. In this case Jerry was born a slave. He was never taken beyond the limits of Kentucky with the approbation or consent of his owner. His trip to Cincinnati and continuance there in the service of Allgaier, was without the knowledge and against the will of his owner. The bailment to Allgaier was limited both as to time and *place.* By the contract of hire he was expressly inhibited from removing him from the State of Kentucky. The act of Allgaier in taking him to Cincinnati, could not be more prejudicial to the rights of his owner, than if he had been taken there by a mere trespasser, or had been stolen and then removed.

When we recollect the spirit of compromise and concession under which the Constitution was adopted, and the deep interest which many of the States felt in the question of fugitive 14 slaves, it can scarcely be seriously contended, that the parties to that instrument ever intended that the right of service should, under such circumstances, be lost to the owner, and his power of reclamation cease. But the Supreme Court of this State, in the case of *Graham v. Strader,* 5 *B. Munroe,* 173, have expressly decided, that if the bailee of a slave, *even with the assent of the owner,* take him to Cincinnati for a temporary purpose, and while there employ him in his service, and the slave afterwards return to Kentucky, no right of freedom is thereby acquired. That case must be regarded as conclusive of the present question. The subsequent elopement of Jerry, after his return to Kentucky,, under pretence of going to procure his clothes, made him an escaping slave.

It results, therefore, that the facts which have been proved upon the inquiry, show that the prisoners are within the protecting clause of the act of 1820, and that the warrant of the Executive does not justify an order for their delivery to the agent of the State of Ohio. All of which the Sheriff is directed to certify to his Excellency the Governor of Kentucky, upon the return of his warrant.

MASON BROWN. *Judge* 17 *th Judicial District*

April 13, 1846.

SPEECH OF MR. JOHNSTON.

May it please your Honor:

Without setting up any claim to modesty, I confess that I appear before you laboring under great embarrassment—such as I never before felt. Not that any inflamatory excitement is felt against me personally, for I know there is none. Not on account of any personal hazard to be incurred by anything I am about to say,—for I know I am safe—but on account of the novelty of my position, and the intrinsic importance of the cause in which I appear, and the vast moment of the questions involved in it. I come here 15 not to quarrel with the domestic institutions of Kentucky, nor to add to the excitement unhappily too great on both sides of the water. I had rather contribute my efforts to promote peace and good will between citizens of sister States, whose interests, rights and feelings are so nearly one; who have so often mingled the blood of consanguinity in the bonds of peace;—and the blood of patriotism on the field of battle, to secure the common blessings of union, liberty and law to both. I come here as the agent of the Executive of Ohio, with a legal requisition for certain persons charged as fugitives from justice. It is my mission to urge certain legal and international rights of the State which I represent; and I feel that in this community I may safely discharge that duty as fully and boldly, as if I stood in the halls of justice in the capital of my own State.

Before I ever set my foot in this State, one of the first incidents which called my attention to the character of its people, was the valedictory address of a veteran Statesman, who, having finished his career, and resigned the cares of public life, had come up, as he said, to lay his hones in Kentucky; because he knew that if they reposed in Kentucky earth, the foot of a tyrant should never tread upon them. And I feel a strong and abiding confidence, as I stand before you to day to debate these vexed and exciting questions, that if there be any spot on earth where the ashes of the dead or the rights of the living are secure, it is on the soil and in the judicial tribunals of Kentucky.

Let me then, as well as I may, overwhelmed by the kindness and the cheers of this venerable assembly, approach the question involved. And first: The statute of Kentucky of 1820, under which this proceeding is had, is at variance with the Constitution of the United States, and the law of Congress of 1793, and void. The statute runs thus:

“ Sec. 1. *Be it enacted by the General Assembly of the Commonwealth of Kentucky,* That in all cases where any negro slave or slaves, have, or may hereafter run away from his, her or their owner or owners, and take protection in any of the United States, and the owner or owners of such slave or slaves, by themselves, their agent or any other person with their approbation, shall have removed, or shall hereafter remove any such slave or slaves from any other State within the United 16 States into this Commonwealth, and he, she or they have been, or shall hereafter be indicted for the same, in any one of the United States, and the Governor of said State shall demand of the Governor of this State the person or persons so indicted, or who may hereafter be indicted, to be delivered to him agreeably to the Constitution of the United States and this State, it shall be the duty of the Governor of this Commonwealth, upon such requisition being made according to law, to issue his warrant to the Sheriff of the county where such supposed fugitive may reside, if he has a known place of residence, requiring him to take into custody such supposed fugitive or fugitives from justice, as are named in such warrant and indictment, and bring him, her or them before a Circuit Judge; and if the Circuit Judge shall be of opinion that the

person or persons named in such warrant and indictment, are the owner or owners of the slave or slaves named in such indictment, or that he, she or they acted as the agent, or by the approbation of the owner or owners of such slave or slaves, it shall be the duty of the Judge to discharge the person or persons taken by virtue of said warrant, out of custody.

Sec. 2. *Be it further enacted,* That if the Judge shall be of opinion that the person or persons taken into custody by virtue of the Governor's warrant, is not the owner or owners of the slave or slaves, in the indictment found against him, her or them, in any one of the United States for stealing and conveying a slave or slaves which are not their own property; or that he, she or they did not act as the agent, or by the approbation of the owner or owners of such slave or slaves, then it shall be the duty of the Judge to remand such person or persous into custody again, to be dealt with according to the laws now in force on that subject."

Two questions of minor importance spring up under this act. First, are these persons within the meaning and protection of the Statute, not being "indicted" by a jury of inquest, but only charged by the affidavits of private citizens? and secondly, was the statute intended to protect any but persons having a legal residence in Kentucky? I suggest these to the consideration of the Court without argument, and proceed to the main question—is the law constitutional? It will not be pretended that the Legislature of Kentucky have not a right, that it is not their duty in some cases to pass laws in aid of the Constitution, and for the purpose of directing the *mode* in which its provisions shall be carried out. The provision of the constitution, Art. IV. Sec. 2. is,—"A person charged in any State with treason, felony or other crime, 17 who shall flee from justice, and be found in another State, shall, on the demand of the executive authority of the state from which he fled, be delivered up, to be removed to the State having jurisdiction of the crime."

It was well remarked by my brother Morehead, that the delivering up of a fugitive from justice, under the constitution, was an executive act. It is so, not because the constitution in so many words designates the executive as the only proper department, for it does

not. The act of congress of 1793 imposes this duty on the executive. The *mode* then of delivering up, may, nay, ought to be directed by statute. But no statute can be valid which thwarts the design of the constitution, or in any way impedes the action or impairs the powers of the executive demanding, or the executive delivering up, such fugitives. Thus, as by the act of 1, the statute may direct that an issue be made before a judge of the court to ascertain the identity of the persons claimed as fugitives. But when the statute, as in the act of 1820, takes the case out of the hands of the executive, for the purpose of trying issues the result of which may defeat the ends of the constitution, it is unconstitutional and void, and the court has no jurisdiction under it.

The act of 1820 proposes to protect from the laws of the demanding State, the owners of slaves, the agents of slave owners, and persons acting by the approbation of slave owners; irrespective of the manner in which they proceed in recovering the slave, or what infractions of law they may have been guilty of in recovering him. Surely the constitution never intended such a thing as this.

The clause in the constitution authorizing persons to whom labor or service is due, to recover the persons held to such labor or service, does not authorize the claimant to seize them *sans ceremonie,* wherever they may be found—hind them hand and foot, and drag them away without proof of ownership, and in the teeth of the laws of the State whither they may have escaped. It says, “They shall be delivered up on claim of the party to whom such service or labor may be due.” “Delivering up,” implies some act by authority, in the state to which the fugitive had fled—not an act of physical force 3 18 on the part of the claimant. And so the congress of 1793 understood the constitution. It is there provided, “That, when a person, held to labor in any of the United States, or in either of the territories on the northwest or south of the river Ohio, under the laws thereof, shall escape into any other of the said states or territories, the person to whom such labor or services may be due, his agent or attorney is hereby empowered to seize or arrest such fugitive from labor, and to take him or her before any judge of the circuit or district courts of the United States, residing or being within the state, or before any magistrate of a county, city, or town

corporate wherein such seizure or arrest shall be made; and, upon proof to the satisfaction of such judge or magistrate, either by oral testimony or affidavit, taken before and certified by a magistrate of any such state or territory, that the person so seized or arrested, doth, under the laws of the state or territory from which he or she fled, owe service or labor to the person claiming him or her, it shall be the duty of such judge or magistrate to give a certificate thereof to such claimant, his agent or attorney, which shall be sufficient warrant for removing the said fugitive from labor to the state or territory to which he or she fled."

Clearly this act contemplates a judicial examination as to the right of the claimant. It contemplates no other mode of reclaiming, and, as this act was passed in aid of the constitution, by a congress, composed to a great extent of the same men, who but five years before had framed the constitution; it may well be received as a fair exponent of that instrument. But whatever protection the owner of the escaping slave may take under the constitution, without such judicial examination as to the ownership, clearly the agent can take none. Agents, in such cases, are not known to the constitution, nor to the ordinance of 1787. The statute of 1793 is the first enactment in which agents are known; and that act provides for such examination.

We in Ohio think such examination indispensable to the cause of justice and humanity. We see nothing but endless confusion, injustice and oppression growing out of the right to drag men, women and children from their homes without such 19 examination. We see encouragement given to a horde of pirates who infest the waters of the Ohio on both its banks, and make man-catching a trade.

I do not say these wretches are Kentuckians. They are to be found on both sides of the water, and do not deserve a name or local habitation on either. They are the enemies of the human race: without sympathy for any body, and entitled to sympathy from nobody: men who will steal your slave *from* you to-day, and sell him *to* you to-morrow.

There is a distinguished character now in the Ohio penitentiary, who made a fortune by first persuading slaves to run away from their masters, quartering them on credulous black people, (who, on account of their color, could not be witnesses against him,) till a reward should be offered, and then conveying them back again for the reward. There are unfortunately others out of the penitentiary who follow the same calling, until, if you were on the southern line of Ohio, you would almost imagine you were on the slave coast of Africa.

About eight years ago a free colored woman, born in Ohio, and residing in Brown county, in the absence of her husband, was seized, and, without examination, or any forms of law whatever, carried into Mason county, Kentucky, and lodged in jail, under pretence that she was the slave of Arthur Fox, High Sheriff of Mason county. Mr. Fox disclaimed ownership in her; and then she was retained in prison under pretence that she was the slave of Mrs. Johns of New Orleans. Mrs. Johns also disclaimed her; and, then being in prison as a runaway slave, she was subject to be sold at the end of fourteen months for jail fees. She was only set at large by executive interposition. I mention this case, not because it is a singular one, but because I happen to be familiar with it, and because it is a matter of record in both states. Cases far more aggravated, of which no record exists, have often occurred. Men believed to be freemen, have been knocked down with a colt in the streets, in the night season, dragged into boats, and carried—God only knows where.

To prevent such outrages, the legislature of Ohio have enacted two statutes against kidnapping. The one against seizing and carrying away free persons: the other against seizing 20 and carrying away any person whatever, without a healing. These statutes of Ohio in no wise contravene the Constitution of the United States or the act of 1793, nor embarrass the owners of fugitive slaves in recovering their property. Ought not these laws to be respected?

Forbes and Armitage stand charged by affidavit under both these statutes. We say Jerry was, by operation of law, a free man, and that in seizing and carrying him forcibly away,

they were guilty of kidnapping. The act was perpetrated in Ohio, by citizens of Ohio, and the tribunals of Ohio alone have jurisdiction of the matter. They alone have a right to inquire whether, under the laws of Ohio, such a state of facts exists, as to bring these men within the law against kidnapping.—

Again: we say that even if Jerry was a slave, Forbes and Armitage had no right to carry him away without a fair hearing under the act of congress of 1793; and that in so doing they were guilty of kidnapping. And the act being perpetrated in Ohio, weclaim for the Ohio tribunals the sole right to try the question, whether they did thus seize and carry him away without trial, or upon a mock trial, or in any way in violation of the laws of Ohio.

Is this claiming too much on the part of a sister in the glorious confederacy? Are not the rights and claims of a sister state to be respected in a case like this? Yet this act of 1820 steps in, as I insist, in violation of the Constitution and laws of the United States, and takes the case out of the hands of the executive and transfers it to the Judiciary, to try questions which belong to the tribunals of Ohio alone. The executive obeys implicitly the statute of 1820, and it h for this court to determine, if your Honor should be satisfied that the statute is void, whether it will take jurisdiction of the matter; or simply try the question of identity under the act of 1815.

If, however, it should be held that the statute of 1820 is valid, then three questions of fact will arise.

1. Is Jerry a slave?

2. Who is his owner?

3. Did Forbes and Armitage act as the agents or with the approbation of the owner?

Upon the second question I do not propose to raise a doubt, 21 for, if Jerry be a slave at all, it may be conceded that Mrs. Long is the owner: for, either in her own right, or as the

executrix of her deceased husband, she represents twenty-six-twenty-sevenths of him; so that if he be the property of any body, he is the property of Mrs. Long.

The third point may be conceded also, so far as Forbes is concerned; because it is in evidence that he acted under a power of attorney, regularly executed by Mrs. Long. But there was no power of attorney authorizing Armitage to act in the premises; nor is there any proof of *express* approbation of his conduct on the part of Mrs. Long; nor any other approbation except what she may have bestowed on him after he arrived at Frankfort with Jerry in his custody. If approbation *ex post facto,* be contemplated by the act of 1820, I have not another word to say on this point. But I believe the statute means no such thing.

But the first is the leading and controlling question. Was Jerry a slave at the time Forbes and Armitage seized him at Columbus? Because, if he were not a slave, neither Mrs. Long nor any one else could be his owner; and all authority to act, based upon such ownership, falls to the ground; and all acts under such nugatory authority are without the protection of the act.

This question, whether we Will or not, leads to discussion of the institution of slavery, as it has existed, and now exists in the United States.

And first: Slavery is not recognized by the law of nature. This broad self-evident truth is laid down in the Declaration of Independence,—"that all men are created equal; that they are endowed by their Creator with certain *unalienable* rights; that amongst these are life, liberty and the pursuit of happiness." The great men who put forth this declaration did not mean to say all men, *except negroes,* are created equal, and endowed by their Creator with the *unalienable* right of *liberty.* Nor did they mean by this declaration to annul existing institutions at variance with this great self-evident truth,—as slavery undoubtedly is,—but they meant then, and for all future time—for themselves and their posterity—to set up this great, self-evident moral truth, as the standard by which all law, and all civilization, 22 should thereafter be tried; not to unravel an evil already too intimately interwoven with

the warp of society to be removed without destroying its texture; but in the name of their country, whose independence they sought to establish, and in the name of the Creator, who bestowed these “unalienable rights,” to protest against its future progress.

This doctrine is in strict accordance with the original charter given by God to our great ancestor, before sin or oppression had marred the beauty and glory of his new creation. With the archetypes of all that was beautiful and good before his mighty eye, “God said, Let us make man in our OWN IMAGE, after our likeness; and let them have *dominion* over the fish of the sea, and over the fowls of she air, and over the cattle, and over all the earth, and over every creeping thing that creepeth upon the earth. So God created man IN HIS OWN IMAGE; in the image of God created he him; male and female created he them.” As they stood thus before the bridal altar, glowing in the charms of youthful love, with this immense dowry before them, he pronounced upon them his parental benediction, and delivered them the charter of their future estate: “And God blessed them, and said unto them, Be fruitful, and multiply, and replenish the earth, and subdue it: and have dominion over the fish of the sea, and over the fowl of the air, and over every living thing that moveth upon the earth.”

All that was not conveyed to man by this charter, the Grantor reserved to himself. And that there might be no misunderstanding, either as to the property granted, or names of the creatures included in the grant, he gave him “livery of seisin—” brought the mighty menagerie “to Adam, to see what he would call them; and whatsoever Adam called every living creature, that was the name thereof.” As if God had said to man—Catch that bounding steed, and put thy brand on his crest, and thy caparison on his back, and make him bear thee whither thou shalt list. Seize that powerful ox, and, putting thy yoke on his neck, compel him to plough the soil. Shear that sheep, and clothe thyself with his fleecy spoils. Snatch down the eagle from the cloud, and draw up leviathan from the deep. Make all living creatures in the heavens above, in the earth beneath, and in the waters under the earth, thy slaves; for 23 *they are thine:* but as for thee, and thy posterity by this beautiful

bride, I have stamped *my own image* upon you. Ye are mine! Thus stood the *meum* and *tuum* of the pristine world.

It is not pretended that the divine law of property, thus laid down, has been always respected; or that slavery has not existed since a very early period of history. Alas! who can look around him on the wrongs and oppressions which wring the hearts of innocent millions without, or feel the workings of ten thousand bitter pangs within, without acknowledging that society has been sadly bruised and disjointed by the fall of man! The first man that was born of woman, murdered the second; and thus on, depravity, disorder, and oppression spread over the whole inhabited earth. We see wars arise, and prisoners of war sold into slavery; nay, whole nations carried away captive, and sold into bondage as a punishment for their crimes, the nations thus punishing them frequently not less criminal than themselves. We see depravity and wickedness, by Divine permission, working out their own penalty and their own cure: but this does not altar the Divine law. Still property in man is contrary to the law of nature. It exists, and is tolerated, in society like some hereditary disease; not as a part of man's original constitution, nor as his constitution ought to be, but superinduced by remote causes at first, and now too deeply fixed to be amputated or rooted out, without inconvenience, pain, or loss of life. It was with reference to this great principle, that, although slavery existed in some form or other, as a local institution in almost all nations, and in Rome herself, it was one of the laws of the twelve tables of Rome, that whenever them was a question between liberty and slavery, the presumption should be on the side of liberty.

But again. Property in human beings is not only contrary to the law of nature, but is contrary to the law of nations.—There is no existing obligation, moral, legal, or international, on the part of one state, to deliver up fugitive slaves from another state. I know that a dictum from the court in the Amistad case* has been often referred to, to establish a different

* 15 Peters' R., 518.

24 rule, but that dictum is clearly not to the point. In that case the captive negroes were claimed, not upon any principle of international law, but under the existing compact of 1795, between Spain and the United States, for the mutual delivery of property in certain cases. The case did not require a decision under the treaty, because the negroes in controversy never had been lawfully slaves.

I say it is contrary to the law of nations, not because it is so written in the black-letter books, but because, for a quarter of a century, the traffic in slaves has been condemned by all the civilized nations of Europe and America. Because the ministers of the principal European powers, in the Congress of Vienna in 1815, solemnly declared in the face of Europe and the world, “that the African Slave trade had been regarded by just and enlightened men in all ages, as repugnant to the principles of humanity and universal morality, and that the public voice of all civilized countries, demanded that it should be suppressed; and that the universal abolition of it was conform. able to the spirit of the age, and the generous principles of the allied powers.” Because, as early as 1821, there was not a flag of any European States, which could legally cover this traffic, to the north of the Equator. Because, by the act of Congress of 1820, and by the Act of the British Parliament of 1824, it is declared to be piracy, and punishable with death.

It will be asked how these acts can affect slavery as a domestic institution. I answer that they in no wise affect it, so long as it is domestic and stays at home. But they stamp upon it the character of a domestic, a local institution. They forbid it to travel on the high seas; and the same principle of law, adjudged by the judicial tribunals of the several states, forbid it to travel by land.

Slavery is then *strictly local.* About this there can be but one opinion amongst those who have examined the subject. In most of the British Colonies, till recently, slavery has existed from time immemorial. We are to-day indebted to Great Britain for the institution amongst us. It was one of the counts on which Mr. Jefferson in his original draft of the Declaration of Independence, indicted the British King—that “he had waged cruel war against human

nature itself, violating its 25 most sacred rights of life and liberty, in the persons of a distant people who never offended him—captivating and carrying them into slavery in another hemisphere, or to incur miserable death in their transportation thither. This piratical warfare, the opprobrium of *infidel* powers, is the warfare of the *christian* King of Great Britain, determined to keep open a market where MEN should be bought and sold: he had prostituted his negative for suppressing every legislative attempt to prohibit or to restrain this execrable commerce."* Yet, tho' slavery has been thus tolerated as a local institution in the provinces of Great Britain, it has been justly the boast of every Englishman, in the eloquent language of Curran, "that the spirit of the British law makes liberty commensurate with, and inseparable from the British soil"—that it "proclaims, even to the stranger and sojourner, the moment he sets his foot upon British earth, that the ground on which he treads is holy, and consecrated by the genius of UNIVERSAL EMANCITATION! No matter in what language his doom may have been pronounced; no matter what complexion incompatible with freedom, an Indian or an African sun may have burnt upon him; no matter in what disastrous battle his liberty may have been cloven down; no matter with what solemnities he may have been devoted upon the altar of slavery; the first moment he touches the sacred soil of Britain, the altar and the god sink together in the dust; his soul walks abroad in her own majesty; his body swells beyond the measure of his chains, that burst from around him, and he stands redeemed, regenerated, and disenthralled, by the irresistable genius of UNIVERSAL EMANCIPATION."

* Jefforzon's Works, Vol. IV.

Such, too, is the common law of France. Property in human beings is strictly local, and cannot exist for a moment, after the slave passes the territorial limits into a state where slavery is not tolerated. And this principle of law in France is dearly recognized by the Courts of Louisiana, where this peculiar institution is far dearer to the people than it is to the people of Kentucky. In the case of Maria Louisa *vs.* Mariat and others,† the defendants had carded a colored girl, admitted

† 8 Louisiana Rep. 475.

26 on all hands to have been a slave in Louisiana, into France, where slavery is not tolerated, and brought her back into Louisiana as a slave; Justice Matthews holds the following language: “The question is, whether the fact of her having been taken to that kingdom by her owners, where slavery or involuntary servitude is not tolerated, operated on the condition of the slave so as to produce an immediate emancipation. That such is the benign and liberal effect of the laws and customs of that state, is proven by two witnesses of unimpeachable credibility. This fact was submitted to the consideration of the jury who tried the cause under the charge of the judge, which we consider to be correct, and was found in favor of the party whose liberty is claimed. Being free for one moment in France, it was not in the power of her former owner to reduce her again to slavery.”

This principle has been held in our own country in every instance where the nature of the case made it necessary or proper for a court to express an opinion. Without multiplying cases to prove a position that will hardly be doubted, in the case of Jones *vs* Vanzandt,* Justice McLean says; “Slavery is local in its character. It depends on the municipal law of the state where it is established. And if a person held in slavery, go beyond the jurisdiction where he is so held, and into another sovereignty where slavery is not tolerated, he becomes free. And this would be the law of these states, had the Constitution of the United States adopted no regulation on the subject.”

* 2 McLean's Rep., 596

“Recaption,” says the judge, “has been named as a common law remedy. But this remedy could not be pursued beyond the sovereignty where slavery exists, and into another jurisdiction which had entered into no compact to surrender the fugitives. There is no general principle in the law of nations, which would require a surrender in such a case.”

We have seen that by the law of nature, by the law of nations, by the common law of England, by the common law of France, and by the common law of our own country,

slavery is strictly local. That property in slaves, unlike that in anything 27 else, is incapable of crossing the territorial line, from one state to another. Within the territorial limits of a state, men, women and children may be bought and sold like “beasts of the plough,” and property in them may be cherished and protected by the municipal laws of the state. They may be subjected to the rule of task-masters, with power to command—to scourge—to exact their sweat and labor. They may groan under their burdens as the Hebrew vassals groaned under Egyptian bondage—without any human ear to hear their complaint, or any human law to relieve their sufferings. But on the territorial line separating one state from another, “the genius of universal Emancipation,” stands like the spirit of Omnipotence on the waters of the Red Sea, to let the slave pass over; to intercept the master's pursuit; and to overthrow and overwhelm the prancing horse, the rattling chariot, and all the pomp, and all the pride, and all the power of pursuing forces.

What then is there to change or limit this great pervading principle of liberty and law? The only law varrying this great principle, in its application to American institutions, is that found, 1. In the ordinance of 1787 for the government of the Northwestern Territory; 2. In the Constitution of the United States; 3. In the act of Congress of 1793. For this law, whenever it occurs, I shall insist on a strict and literal construction.

The ordinance of 1787 is two-fold. The first part municipal and temporary, the second general and perpetual. The former for the government of the territory only, and to remain in force until the other laws should be established, and no longer: the latter unalterable and inherent in the bond of confederacy between the states. Or, to use its own broad, deep, and unmistakeable language: “It is hereby ordained by the authority aforesaid, that the following articles shall be considered as articles of Compact between the original states and the people and states of said territory, and forever unalterable except by common consent, to wit:”—And here follow six articles of older law than the Constitution of the United States, The Constitution of Kentucky, or the Constitution of Ohio, and paramount to them all. The sixth of these was intended forever to prohibit slavery northwest of the Ohio river, without 4 28 disturbing rights already acquired in this species of property in the

old states. “There shall be neither slavery nor involuntary servitude in the said territory, otherwise than in the punishment of crimes, whereof the party shall have been duly convicted: provided always that any person *escaping into* the same, from whom labor and service is lawfully claimed in any of the *original states,* such fugitive may be lawfully reclaimed, and conveyed to the person claiming his or her labor or service as aforesaid.”

The general rule laid down in that document, is, “There shall be neither slavery nor involuntary servitude in the said territory, otherwise than in the punishment of crimes, whereof the party shall have been duly convicted.” The restriction to this general rule, is, “Provided always, that any person *escaping into* the same, from whom service or labor is lawfully claimed in any one of the original states, such fugitive may be lawfully reclaimed, and conveyed to the person claiming his or her labor or service as aforesaid.” This general rule, securing freedom, cannot be annulled by any state, or United States convention: and lest it should be overlooked or forgotten, it is copied verbatim into the constitution of Ohio: There shall be neither slavery nor involuntary servitude in this state, otherwise than for the punishment of crimes, whereof the party shall have been duly convicted.” The restrictive clause, tho' not so literally copied, is preserved with equal care, in the constitution of the United States: “No person held to service or labor in one state, under the laws thereof, *escaping into* another, shall in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on the claim of the party to whom such service or labor may be due.” But neither the constitution of the United States, nor that of Ohio, pretends to alter, enlarge, or diminish the ordinance of 1787. It is still in full force, and paramount to both.

Mark you then their peculiar language. “ *Escaping into,* are the words employed in each and all of these documents. “ *Escaping* ” implies a voluntary act of the slavs, contrary to the will of his master. If he thus *escape,* he drags his chain with him. He may flee from state to state all over the Union, 29 and into what state soever he may fly, where the ordinance of 1787, or the constitution of the United States is in force—

“He drags at each remove a lengthened chain,” but the moment he sets his foot on the soil of the Northwestern Territory, by any other means than by his own voluntary *escape,* he becomes *ipso facto* free. Every lock, and bolt and link of his chain melts into thin air; and his emancipated limbs, charmed by the spirit of freedom, are proof against all future manacles.

These restrictive clauses, by all known and universal rules of construction, must be strictly construed. That in the ordinance, on which both the others are founded, should be strictly construed, because it is a proviso, a saving clause, limiting and restricting the general rule of the law. Freedom is the rule; slavery in a certain case, is the exception. The body of the law protests forever against slavery and involuntary servitude. The saving clause provides that *escaping* slaves may be reclaimed. The great object of the law is first to be considered, and if the exception were wholly repugnant to the law, it would be void. It is not wholly repugnant to the law, but it is restrictive of its ends, and must be understood literally—to mean what it says, and no more.

But there are still higher reasons for the strict construction of these clauses. They are repugnant to the law of nature, by which all men are created equal, and endowed with the unalienable right of liberty. They are repugnant to the law of nations, which recognizes no right on the part of a slave owner to pursue an escaping slave beyond the territorial limits of his own state, and which makes him free the moment he sets his foot upon the soil of a state where slavery does not exist.—They are repugnant to the common law of England, from whence we derive our civil jurisprudence, and the common law of our own country, which does not recognize property in human beings. More than all, they are restrictive of human liberty, and must be strictly construed—as much so as criminal statutes, under which the life and liberty of a citizen may be taken away.

Hitherto we have discussed abstract principles, applicable alike to every case. Let us for a moment look at what may be called *Jerry's peculiar case;* and see whether he is a slave or a 30 free man. He has been twice in Ohio; and it is remarkable that he did not

“escape” thither in either case. He has returned twice to Kentucky, without his own volition in either instance. The second time he visited Ohio, it is not pretended that the present claimant, Mrs. Long, did not give him permission to go. He asked permission to return for his clothes, and she granted it. Where? To the place where he had served Allgaier. Where was that? At Cincinnati, where Mrs, Long had learned that Allgaier had taken him, and to which she directed her letter, threatening him with a law-suit if he did not bring Jerry back. At this time, then, he went by permission of his mistress; as much so as if she had come herself, with Jerry attending on her as a servant. He went by her direction on her business, to a state where slavery is not toleraated; and if, indeed, we can suppose he was a slave after his return with Allgaier, this last act made him free. In the case of Ohio *vs.* Hoppess,* tried on habeas corpus before Judge Read of the Supreme Court of Ohio; this doctrine was clearly laid down. And although the facts of the case, in his opinion, did not authorize the discharge of Watson from the defendant's custody, the Judge lays down the doctrine thus: “If a master bring his slave into the state of Ohio, he loses all power over him. The relation of master and slave is strictly territorial. If the master take his slave beyond the influence of the law which creates the relation, it fails—there is nothing to support it—and they stand as man and man. The slave is free by the laws of the state to which he has been brought by the master, and there is no law authorizing the master to force him back to the state which recognizes and enforces the relation of master and slave.”

* Western Law Journal, 270.

The same doctrine is laid down by Justice McLean in the Circuit Court of the United States, in the case of Jones vs. Vanzandt,† which was an action brought under the act of Congress, by the master, against a citizen of Ohio, for aiding fugitive slaves to escape from labor, &c. The Judge holds this clear languge: “Now if the slaves left the service of the plaintiff, with his consent, or in any other mode, except as fugitives from labor, and come into the possession of the defendent,

† 2 McLean's R. 596.

31 as alleged, the plaintiff has no right to their services, and still less, to recover from the defendent their value."

So, too, the rule was held by Chief Justice Shaw of Massachusetts, in the case of Massachusetts vs. Avis.* In this case the slave Med was carried into Massachusetts for a very temporary purpose indeed—merely to wait on her mistress while on a visit to her father and friends in Boston, and then return again to New Orleans. The opinion of the Judge is a very elaborate one, and is in itself a valuable digest of the law of slavery; and after examining numerous authorities from different states, he comes to this conclusion: The "constitution and laws of the United States, then, are confined to cases of slaves escaping from other states, and coming within the limits of this state without the consent and against the will of their masters, and cannot by any sound construction, extend to a case where the slave does not escape, and does not come within the limits of this state against the will of his master, but by his own act and permission. This provision is to be construed according to its plain terms and import, and cannot be extended beyond this, and where the case is not that of an escape, the general rule shall have its effect. It is upon these grounds, we are of opinion, thrt the owner of a slave in another state, where slavery is warranted by law, voluntarily bringing such slave into this state, has no authority to detain him against his will, or to carry him out of the state against his consent for the purpose of being held in slavery."

* Law of Slavery, 357.

In support of this doctrine, Chief Justice Shaw cites two cases amongst others, which I beg leave to refer to, not because they are stronger than fifty others which might be cited, but because they are the decisions of one of the best and purest of the Judges of the United States court, himself born and educated in a slave state, and a slave-holder. I refer to the decisions of Justice Washington, in the cases of Butler vs. Hopper,† and *Ex parte* Simmons.‡ In the former of these cases it was held in terms, that "the provision of the constitution does not extend to the case of a slave voluntarily carried by his master into

another state, and there leaving him under the protection of some law declaring him free." This was a case somewhat peculiar,

† 4 Wash. C. C. Pep. 396.

‡ 1 Wash. C.C. Rep. 499.

32 as the master claimed the benefit of a law of Pennsylvania, allowing members of Congress and sojurners to retain their domestic slaves; both of which rights he had forfeited; the one by ceasing to be a member of congress, and the other by becoming a resident. But the case is an authority to this point; that the claimant of a slave, to avail himself of the provisions of the constitution of the United States, must bring himself within their plain and obvious meaning, that they will not be extended by construction, and that the clause tn the constitution is confined to the case of a slave escaping from one state and fleeing into another. The latter case was an application under the act of congress of 1793, for a certificate of ownership, to enable the master to carry away a slave; and the same Judge held, "that both the constitution and the laws of the United States apply only to fugitives, escaping from one state and fleeing into another, and not to the case of a slave voluntarily brought by the master." In the case at bar, the slave neither *escaped from* one state, nor *fled into* another.

What has been said in relation to the second time Jerry went to Ohio, applies with equal force to the first. Perhaps with greater force in Kentucky.

I am well aware that it has been held by the Court of Appeals of Kentucky, in the case of Graham vs. Strader, and in some older cases, that for the temporary purpose of a mere sojourner, a slave holder may take his slave within the Northwestern Territory, without forfeiting his property. But there is no case in the books in Kentucky or elsewhere, that I have met with, where it has been decided that a man actually domiciled in Ohio, as Allgaier was, may keep a slave at hard labor for six months, without an infraction of the constitution or the ordinance, which forever inhibit "slavery or involuntary servitude," within

the territory into which he has voluntarily gone. Surely no judicial tribunal has attempted to extend the municipal law of Kentucky, by which alone slavery exists here, into Ohio.

I have said that slavery is strictly local, and that its limits are territorial. Then on every principle of state sovereignty, an obligation arises on both sides to let each other, and each 33 others local and domestic institutions above. “Hands off,” is the principle. The people of Ohio have no right to say, you shall, or shall not, do this or that with your slaves. If it be a sin against Heaven, upon you and your children be the consequences. If it be a political evil, you and your children shall be the sufferers. But as for us, we have no right, no power,—I trust no disposition to intermeddle. But while we thus disclaim all right to intermeddle with the institutions of Kentucky, we insist upon the mutuality of the obligation. Slavery may not come upon the soil of Ohio, or even leave its footprint in the sand above the low water mark. The ordinance of 1787, like the blessing of a patron saint, infused into the soil of Ohio an incapacity to support the footsteps of any other than a free man. The name of Nathan Dane is as dear to us as the name of Daniel Boone is to Kentucky. We are not privileged to inter his bones and erect his monument as our Capital.* But he has a more enduring monument in the results of his far-seeing policy. This ordinance has clothed thousands of fields with waving corn; covered thousands of hills with bleating sheep; set in motion a thousand plashing water-wheels, and ten thousand busy spindles; erected thousands of free and public schools; and made thousands of hardy intelligent peasants, as with their sunburnt sons at their heels, each tills his hundred and sixty acres of land, exult in the thought that there is no state like the state of Ohio. Yet if the doctrine should be established, that this ordinance is only to affect the rights of those who reside within the Northwestern Territory, and that those who reside out of it, though parties to the compact, are not bound by it, but may carry their slaves with them, when and where they please, to work an hour, a day, a week, a month, or six months; then this ordinance the poor man's shield, the free man's boast, the inspiring soul of the North-Western Territory, is frail and worthless as a withered leaf driven before the autumnal winds.

* The remains of Daniel Boone have recently been removed from Missouri and deposited in a new cemetery at Frankfort, where an elegant monument is to be erected to his memory.

Let us take a plain case, and see whether the domicile of the master can affect the question. A rich slave-holder in Kentucky, opposite Cincinnati, quarters on the bank of the 5 34 river one thousand able-bodied slaves, and furnishing each of them with a horse and dray, sends them over every morning at sunrise to compete with the free laborers of Cincinnati, requiring that each shall be in quarter in Kentucky, before the sun goes down, lest any one might suspect that either the slave or his master was domiciled in Ohio. May he exercise this privilege? By the constitution of the United states, “The citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states.” Thus, the life, the liberty, the character, the property, of every Kentuckian Who comes on the soil of Ohio, are as sacred, not merely to the law, but to the hearts of the Ohio people, as if they were their own. But may a citizen of Kentucky, merely because he is domiciled in Kentucky, exercise in Ohio, a privilege denied by the ordinance, and by the constitution of Ohio, to her own citizens? And is the law of “escaping slaves” applicable to each of these 1000 negroes, every evening when he returns to his quarter? If so, then slavery and involuntary servitude may be superinduced on Ohio by any citizen of Kentucky, or by any citizen of Ohio, who shall choose to build his house south-west of the Ohio River, in spite of all the ordinances and constitutions in the universe.

Let me ask you, sir, what was the condition of Jerry during the six months he worked in Ohio? Was he a free man or a slave? “He was a fugitive slave,” some gentleman on my left suggests, and I thank him for the suggestion. And pray, sir, what is a fugitive slave? The ordinance of 1787, the constitution of the United States, and the act of congress of 1793, all define it in the same way. A person owing labor or service, &c., “ *escaping into* ” the territory. The word “fugitive” does not occur; the less classical but more pregnant word “ESCAPING” does. Did Jerry come into Ohio as an “ *escaping* ” slave? He no more

“ *escaped* ” into Ohio with Allgaier, than he “escaped” out of it with Forbes and Armitage. Can any man, bound hand and foot, and without his own volition carried across a river into another state be said to “ *escape?* ”—Jerry, to be sure, was not literally bound hand and foot; and to the observation of one who did not know his condition, seemed to have all the attributes of a man. But not so. The 35 fetters of the law were upon him. He did not possess, in his own right, one attribute of a man. He was a slave—the slave of Allgaier, who for the year had as complete dominion over him as Mrs. Brown could have had. It was his duty to feed, clothe, house and physic him. It was his privilege to command, govern and punish him. He said to him, Go, and he went; come, and he came; Do this, and he did it. Jerry's heart might have belonged to some one else, but his hands were the hands of Allgaier; his feet were the feet of Allgaier; his will was the *will* of Allgaier; and by the *will* of Allgaier, and not his own, he was brought to Ohio. Call you this an escaping slave?

Again I ask your honor, what was the condition of Jerry during the six months he served Allgaier in Ohio? He went to Ohio a mere chattel, without a hand, a foot, a will, or an action of his own; and could in no sense be considered an escaping slave. He could not be a slave in Ohio, other than an *escaping* one, else the ordinance of 1787 is perfectly nugatory. If Jerry was not in a state of FREEDOM during this six months, he was in a state of profound mystery. I hope one day to see with better eyes, and hear with better ears, but while I remain in this muddy vesture of flesh and blood, I shall never be able to penetrate this mystery.

I have heard the fine spun distinction taken, between the right to be free, and freedom itself. But however much force may be in this distinction in a state where a colored man is prima facia a slave, and where persons are sometimes wrongfully kept in slavery, who by law are entitled [to be free, it can have no force whatever where a slave, without “escaping,” comes into a state where every man not a criminal, is not only prima facia but absolutely free. This distinction was repudiated in the case of Lunsford vs. Coquillon,* and the rule held that in a free state whosoever was entitled to freedom, was in fact already free. Being free, then in the language of Justice Matthews, before cited, “but for

a moment," he could never again be reduced to bondage. Never! Not even by his own voluntary act, for the right of liberty being unalienable, he could neither sell it, nor give it away, nor in any other way

* 14 Matthews Rep. 401.

36 forfeit it, except by the commission of a crime. The runaway slave may return to his master and remain a slave, because by "escaping" he does not change his condition, and he never was free: but the man once made free by operation of law, can never again become a slave.

But it is useless with the existing state of facts, to moot the question whether a freed slave may voluntarily alienate his freedom, and go back into slavery; because, in this case, Jerry came as he went, not by his own will, but by the will of Allgaier. And in thus carrying a free man into slavery, Allgaier committed an act of tortious violence, which could in no way affect the rights of Jerry. I say his act was tortious, although no physical violence may have been offered; because it matters nothing whether an act of oppression be perpetrated under pretence of authority where none exists, or by physical violence without such pretence. Jerry was a free man without knowing it. Allgaier enslaved his mind—riveted on his imagination the chains of the law—and thus imprisoned and manacled, carried him back and delivered him to his former owner. This could in no wise be considered the voluntary act of Jerry, nor so construed as to affect his rights. And so the rule was held by Justice Martin of Louisiana, in the case of Lunsford vs. Coquillon, just cited. So, too, the rule was recently held by Justice McLean, in the Circuit Court of the United States in Indiana, in a case not yet officially reported, where the master had brought his slave from Kentucky within the limits of a free state, and taking the alarm, lest they should be induced to leave him, took them, for greater security, to the state of Missouri. In this case the judge held that it was not necessary to pass upon the question whether the slave might waive his right of freedom after it had accrued, and again return into slavery, because in that case they passed over to Missouri in custody of the master, as slaves. That the master was guilty of a tort in thus taking them over, and that their rights could not be affected by this

act. On this point I need not multiply cases. The books are full of them; and if they were all blank on the subject, common sense would speak out and say that a slave, while in the custody of his master has no will. This is the great point of distinction between a free man 37 and a slave. The free man has a will; the slave has none. Then whatever rights Jerry may have acquired, in going to Ohio by the will of his master, came with him back to Kentucky, because they could not be taken from him by the act of Allgaier.

But we are met with the fact that Allgaier was a bailee merely. Agreed. He was a bailee for hire for the term of one year, and his dominion over Jerry, though complete while it lasted, was of limited duration. But a bailee can no more establish slavery in the Northwestern Territory, by carrying slaves into it and working them, than their lawful owner can. The prohibition is broad and comprehensive. “There shall be neither slavery nor involuntary servitude within the Territory,”—without any exception in favor of bailees or bailors. There shall be no slave labor in the Territory, and no person reclaimed as a slave, unless he shall have *escaped into* it.

We are told that it would be a great hardship if Allgaier, by his faithlessness, should be permitted to deprive this lady of her property. If I remember rightly, this Allgaier was a gambler by profession; and if so, it was his trade to rob poor women of their property, and poor children of their bread, and leave them without remedy. But Mrs. Long was not left without remedy. She had her right of action against Allgaier for the loss of Jerry's services; and that was her only remedy. This remedy she seems to have understood well enough, when she wrote letter to Allgaier at Cincinnati, threatening to sue him if he did not immediately bring back her slave.

It is said, indeed, by lawyers, that a bailee for hire cannot so dispose of the bailor's property as to hazard the rights of the bailor; and that so far as the rights of the lawful owner are concerned, there is no difference between a breach of trust and a larceny. And applying this principle of law to the present case, Allgaier's act, in taking Jerry to Ohio, contrary to the injunction of his mistress, no more affects her rights than if he had been

stolen, or taken away from her by force. This principle of law is doubtless correct in relation to property in ordinary chattels, but can have no application to property in human beings. If Jerry had been a horse or any other animal, in which, by the law of nature, by the common law, and by the 38 usage of all civilized nations, property exists, Allgaier could not have so disposed of him, not even by the shrewdest slight of the gambling craft, but that his lawful owner could have taken him by replevin, or some other legal process, wherever she found him. But there is this wide distinction between property in animals and property in man: property in animals is sanctioned by the law of nature, and the common law; is universal and binding every where: property in man is contrary to the law of nature, contrary to the common law, strictly local, and binding only within the territorial limits where slavery exists by force of the municipal law. The legal notion of *personal* property is, that it is that sort of property which may attend upon a man's person wherever he goes, in contradistinction to that which is fixed and immovable. And upon this hypothesis we say, a man's property acquired in one state, by the comity of nations, is his property in every other state. Admit this principle in regard to property in men, and whither will it lead you? or, whither will it not drive you? A man acquires property in a slave in Kentucky, where, by the municipal law, such property is recognised: it is at his option to establish slavery in every other State in the union, wherever he may choose to travel, for the slave, being personal property, may attend on his person wherever he goes. But how shall he keep up this relation of master and slave, where, by the organic law of the state, and by a compact of still higher obligation, to which he himself is a party, it is declared that there shall be neither slavery nor involuntary servitude? The moment he crosses the territorial line, this relation ceases, because there is no law to support it. And with it perish all the rules of law regulating property in men, and all the ordinary remedies by which such property is guarded. No such property exists in Ohio. No action of replevin, nor any other action, woud lie for the recovery of such property. The only instance in which one human being can lay hands on another, and claim him as his own, is where a person lawfully held to labor or service in one of the original states, shall *escape into* the State of Ohio.

This brings us back to the old question: Did Jerry " *escape into* " Ohio. I think I have shown conclusively from the facts, that when Jerry left the state of Kentucky, where he was lawfully held to labor or service, he was a slave without volition; 39 that he was subject to the will of one having absolute control over him; that he went into Ohio in obedience to the will of a master who had the power to command him, to whip him, to fetter him, and to carry him when and where he listed; and that under the circumstances, he could be considered in no sense an *escaping* slave.

Jerry Finney, then, at the time of his seizure by Forbes and Armitage, was by operation of law, a free man of Ohio. Disfranchised, indeed, of the right to hold office, the right to vote, the right to testify: but so far as it regarded the fight of any one to claim his labor, or restrain his liberty, he was as free as any of us. No one had a right to pursue him, either in person, or by agent; and these men by assuming such agency, and carrying him away, have placed themselves within the law of kidnappers, and fugitives from justice, and without the protection of the laws of Kentucky.

I have now urged all the points which I consider material to the issue, and laid down, as fairly as my limited time for investigation, and my feeble abilities, would allow, what I believe to be the law of the case, both as it regards the organic taw of the nation, and the municipal laws of Kentucky and Ohio—what is held to be the law in Ohio—what is held to be the law in Louisiana and other states, where slavery exists—and what I believe to be the common law of all christian and civilized nations.

1. The Kentucky statute of 1820 is at variance with the Constitution of the United States and the law of Congress of 1793 and void.

2. If the statute of 1820 be void, the court has jurisdiction only of the question of identity under the statute of 1815.

If the statute of 1820 be valid, and the court has jurisdiction, then three questions of fact are involved.

1. Is Jerry a slave and the property of any one?

2. Who is his owner?

3. Die Forbes and Armitage act as the agents, or with the approbation of the owner?

The second point is conceded, for if Jerry be a slave, Mrs. Long representing in her own right, and as administratrix of her deceased husband, 26–27ths of Jerry, for the purposes of this case may be considered the owner.

The third point is conceded also, as to Forbes, but insisted on as to Armitage, because their is no proof of the *express* approbation of the owner as to him.

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The main question is upon the first point. Was Jerry a slave at the time Forbes and Armitage aided in seizing him at Columbus?

1. Slavery is contrary to the law of nature, and contrary to the law of nations, and exists only by force of the municipal law of the land.

2. Slavery is strictly local and confined within the territorial limits of the state where it is sanctioned, and cannot follow the fugitive beyond those limits, except by positive law binding on both sides of the line.

3. The only law varying these great principles of natural and international law, is that to be found, 1st, in the ordinance of 1787 for the government of the Northwestern Territory: 2d, in the Constitution of the United States, and 3d, in the law of Congress of 1793, which latter cannot be so construed as to diminish the guaranty of liberty contained in the

ordinance of 1787, or to extend the rights guaranteed to the owners of fugitive slaves, by the Constitution of the United States.

4. The clauses of the ordinance of 1787, of the Constitution of the United States and of the law of Congress of 1793, anthorizing fugitives from labor to be pursued into the North Western Territory, being contrary to the law of nature, contrary to the law of nations, and restrictive of human liberty, must be strictly construed.

5. Strictly construed, these clauses can extend to but one case—that of an *escaping slave.* This implies a voluntary act of the slave, contrary to the will of the master, and if by any other means than by his own will he is carried into the North Western Territory, the relation of Slavery ceases as completely as if he had been carried into France or any other foreign state.

6. If the slave becomes free but for a moment, he can never again be reduced to slavery: not even by his own act, because the right of freedom is unalienable.

7. It matters not that the slave was carried beyond the line by a bailee to whom he was hired; if he is carried over in the relation of a slave, even by a person having a temporary dominion over him, he becomes *ipso facto* free, and the owner has his right of action against the bailee for the loss of his services. The law governing chattels does not apply to property in human beings. God gave man dominion over, and property in the beasts of the field, &c., but the property in man he reserved to himself. The property in animals is natural and binding every where; that in man, is conventional, municipal, local, and to be kept within the literal meaning of the written law.

These points I have urged with some warmth, but no more, I trust, than becomes one believing most religiously the truth of what he says.

But I have another duty to discharge. I cannot sit down without thanking the court for the indulgence and facilities afforded me; vacating all other business for my accommodation, and tendering every means in its power to dispatch my mission. The authorities have received me promptly and respectfully, and the citizens have displayed not merely the civility due a stranger, but the courtesy and kindness due to a brother of the Union. For all this I feel that I owe an expression of hearty gratitude; and whatever other message the result of the deliberation of the court may require me to bear back to the authorities of Ohio, I shall feel it a duty which I shall execute with the liveliest pleasure, to tell them, that I have discussed the subject of slavery in the capital of Kentucky, with boldness and safety; surrounded by slave holders who treated me with the utmost consideration and respect.